

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, ) 8:13CR105-001  
 )  
 Plaintiff, )  
 ) Omaha, Nebraska  
 vs. ) March 25, 2014  
 ) 1:31 p.m.  
TIMOTHY DeFOGGI, )  
 )  
 Defendant. )

TRANSCRIPT OF HEARING ON MOTIONS

BEFORE THE HONORABLE THOMAS D. THALKEN

UNITED STATES MAGISTRATE JUDGE

## 11 | APPEARANCES:

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25 Proceedings transcribed from audiotape, transcript produced  
with computer.

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1 (On March 25, 2014, at 1:31 p.m., the following proceedings  
2 were held:)

3 THE COURT: United States versus Timothy DeFoggi,  
4 carrying the number 8:13CR105. Counsel enter their appearance  
5 for the record, please.

6 MR. BECKER: Good afternoon, Your Honor, Keith Becker  
7 for the United States.

8 MS. CHANG: Good afternoon, Sarah Chang for the United  
9 States.

10 MR. NORRIS: Your Honor, Michael Morris for the United  
11 States.

12 MR. BERRY: John Berry for the defendant, Timothy  
13 DeFoggi.

14 THE COURT: All right. We're here on various motions  
15 of the defendant. First let's deal with the motion to sever,  
16 which is filing number 102. Mr. Berry?

17 MR. BERRY: Your Honor, during our initial conference  
18 with Mr. -- or Judge Bataillon after I was assigned to this  
19 case, the judge indicated that the time was (indiscernible) for  
20 filing motions. He also indicated that the motion to sever was  
21 never addressed by him because previous counsel did not object  
22 to the -- to your finding. So I have filed the motion as well  
23 as a brief. It is substantially similar to what previous  
24 counsel has filed. I don't have any additional or new  
25 arguments.

1       My issue is that previous counsel did not object to the  
2 finding, did not preserve the issue, so that's -- that -- that  
3 is my intent for doing it today. Like I said, I think the  
4 issues are the same in terms of whether there is any connection  
5 to the codefendant to Mr. DeFoggi, I -- I don't see it. And of  
6 course, I think that it would be unfairly prejudicial to link  
7 them. I think I've addressed that in my brief.

8                     THE COURT: Let's deal, well, with the issue of unfair  
9 prejudice or -- and so forth with regards to your client.  
10 Would you address that, please?

11                    MR. BERRY: Your Honor, essentially you have a  
12 codefendant who there's no -- I don't believe there's any  
13 evidence that Mr. DeFoggi talked with him, interacted with him  
14 at all. Only that this is a person who visited a similar --  
15 allegedly visited a similar site, this PedoBook site out on  
16 the -- the Tor network. Grouping Mr. DeFoggi with another  
17 person who allegedly has an interest in child pornography, who  
18 has allegedly received child pornography, and is -- but yet in  
19 no way is associated to Mr. DeFoggi is unfairly prejudicial to  
20 him because it lumps him in with someone else who was an  
21 alleged pedophile.

22                   THE COURT: All right. Government?

23                   MR. BECKER: Your Honor, we've responded with regard  
24 to our brief. I don't have the filing number in front of me,  
25 but our brief basically indicates that this has been raised

1 before you previously.

2 THE COURT: Filing number 126.

3 MR. BECKER: Filing 126 --

4 THE COURT: Okay.

5 MR. BECKER: -- Your Honor. In filing number 126  
6 we've indicated to you that this was raised previously. There  
7 are no new issues; that you concluded that severance was not in  
8 order. Whether it be law of the case, whether it be some sort  
9 of estoppel argument, whether it just be a collateral issue, he  
10 can't raise it again.

11 But let's say that he can raise it again and let's deal  
12 with the issues themselves. When he says that he has  
13 substantial prejudice because he's on the same board as another  
14 individual who's on that board, the prejudice that he creates  
15 is mostly at his own hands. It's prejudice that he has made by  
16 postings to the board. It's prejudice that he has done.

17 And the jury is going to be able to segregate, as you  
18 indicated in your previous order, whose actions were whose on  
19 that particular board. As you'll see in other hearings that  
20 will -- or other evidence that we'll have during these hearings  
21 that we're having this afternoon, he's got postings that he  
22 writes to the board. Postings that are clearly and easily  
23 identifiable as his own as opposed to that of his codefendant.

24 The codefendant who visited sites on the board is visiting  
25 sites on the board that many of which are distinct and

1 different than that in which Mr. DeFoggi is visiting. And such  
2 for a jury to compartmentalize that should be a very easy task.  
3 And so for that reason, Your Honor, we're asking that the case  
4 not be severed.

5 There's additional reasons. This is unlike the 106, 107,  
6 and 108, where people are only charged with access with intent  
7 to view and receipt of child pornography. Obviously in this  
8 particular case, there's a conspiracy to distribute. There is  
9 advertisement and there's the CEE charge, Count I.

10 So for those reasons, it should not be severed.

11 THE COURT: All right. Mr. Berry, anything further?

12 MR. BERRY: No, Your Honor.

13 THE COURT: All right. The -- the evidence which the  
14 Court should consider on the motion to sever should be what,  
15 Mr. Berry, as far as you're concerned?

16 MR. BERRY: Well, I think --

17 THE COURT: Just the indictment and --

18 MR. BERRY: Correct. The -- right, the indictment.

19 THE COURT: All right. Anything from the government's  
20 side?

21 MR. BECKER: Your Honor, I think at some point we are  
22 going to offer you -- and it may be more in the motion in  
23 limine, certain chats and certain postings that the defendant  
24 made --

25 THE COURT: Uh-huh.

1                   MR. BECKER: -- so I think you can consider those as  
2 well. We can offer them at this point or we can wait until  
3 that and then ask you to take notice of those as well.

4                   THE COURT: I'll let you reserve at this point. Okay.

5                   MR. BECKER: Thank you.

6                   THE COURT: All right. The other -- let's go to  
7 then -- the motion to sever will then be taken under  
8 advisement. The -- which is the -- make sure we get the  
9 right -- which is 102. All right.

10                  Then we have a motion for additional discovery, motion for  
11 independent review of internet and computer-related matters as  
12 amended. So it's 104, 108, and 110. I think we should  
13 consider all those together at this point. And so I'll hear  
14 you on that, Mr. Berry.

15                  MR. BERRY: Your Honor, in terms of the -- the -- the  
16 motion for additional discovery, Mr. DeFoggi has pointed out  
17 items that he wishes to have. The government responded to  
18 that, that -- that was also -- to me, and that was also put in  
19 their response.

20                  I think at this point until I have a forensic expert I'd  
21 like to reserve the right to renew this motion later. My  
22 concern is that due to the complex nature of the case, we're  
23 talk -- this isn't a run-of-the-mill child pornography case.  
24 Obviously we're talking about the onion router and several  
25 complex issues.

1           I am not competent, I think, as an attorney to determine  
2 the exact nature or reasons for some of these. Mr. DeFoggi has  
3 some reasons, but I would like to vet those with an expert  
4 witness. And so I would ask that the Court allow me to reserve  
5 this motion to address it at another time once I have been able  
6 to confer with an expert witness regarding the relevance and  
7 validity of some of the things that Mr. DeFoggi is requesting.

8           THE COURT: Have you engaged an expert witness at this  
9 point?

10          MR. BERRY: I -- Your Honor, I have contacted an  
11 expert witness, a Dan Meineke. I have filed a motion for funds  
12 to -- to appoint an expert. I filed it with the other motions  
13 in here. I believe it's filing number 108 and 110, which is a  
14 motion for independent review, I think is how I had to put it  
15 into the CM/ECF system.

16          THE COURT: The -- have you prepared a form -- CJA  
17 Form 21 for the purposes of hiring the -- the expert?

18          MR. BERRY: I have, Your Honor.

19          THE COURT: And -- and you submitted that?

20          MR. BERRY: I -- I have not yet, Your Honor.

21          THE COURT: All right. What is the -- well, let me --  
22 we have 10 -- we have the 104 which is a motion for additional  
23 discovery. And it appears from the government's response that  
24 all of that -- all of those matters have been provided to you  
25 at this point or the government has asserted that such items

1 are not in their possession. Is that my -- is that my reading  
2 of the government's response?

3 MR. BECKER: That's correct from our perspective, Your  
4 Honor.

5 THE COURT: All right. And is -- and from your review  
6 now of your request, and the government's response, is there  
7 anything that's -- that you don't have that we're dealing with  
8 in 104?

9 MR. BERRY: There are, Your Honor, some electronic  
10 storage devices that Mr. DeFoggi has indicated that he and  
11 others in his residence believe were at the house at the time  
12 that the warrant was executed, and believes -- believes were  
13 taken. However, I don't have any evidence. I can --

14 THE COURT: All right.

15 MR. BERRY: -- get affidavits from my client, from the  
16 other witnesses, but I have no evidence to show that those are  
17 in the government's possession.

18 Additionally, Mr. Becker also pointed out in his response  
19 that some of that information that I need may be in the FTK or  
20 forensic tool kit report, so once again having an expert review  
21 some of that I think -- I think will be -- will be helpful. I  
22 think some of those electronic storage devices that Mr.  
23 DeFoggi's concerned about, if they were plugged into any of the  
24 computers seized, that would show up on the registry, but I  
25 would like to have, like I said, the expert review that.

1           So I think that most of the stuff could be cleared up  
2       with -- with the use of an expert. And I think that after I've  
3       had that opportunity then if there's anything remaining I'd  
4       like to address it. But I think that a lot of this stuff can  
5       be cleared up.

6           THE COURT: The -- rather than leaving 104 hanging in  
7       the air on the matter I'm going to deny the motion as moot  
8       without prejudice, so that you can -- in the event that there  
9       are items that you need, that you can file an -- file an  
10      additional motion. But from the government's response and your  
11      motion, I'm going to deny the motion essentially as moot, but  
12      deny it without prejudice so that you can re-assert it in the  
13      event that you need to request additional discovery that you  
14      can demonstrate that the government has or should have. Okay?

15           MR. BERRY: Yes, Your Honor.

16           THE COURT: All right. So to that extent, 104 will be  
17      denied as moot for the reasons I have stated here on the  
18      record.

19           We have then the other motion of 108 and 110. And how long  
20      is Mr. -- how long is Mr. Meineke going to take to do his  
21      analysis?

22           MR. BERRY: Your Honor, at this point I -- I'm not for  
23      certain. I know that he has previously met with Mr. Tarpinian.  
24      He also is -- is working with one of the codefendants in this  
25      case, so he is familiar with the case. However, at this point

1 I -- I -- I think you're probably looking at roughly 8 to 10  
2 hours. And that's probably going to be more than the CJ  
3 amount, but once again, I -- I can't -- I can't speak for --

4 THE COURT: Well, I'm not -- I'm not so much concerned  
5 at this point with the dollar amount under CJ 21, I'm concerned  
6 with the time that's going to take before you're in a situation  
7 to proceed.

8 MR. BERRY: Yes, Your Honor.

9 THE COURT: Okay. Now, that's what the -- when I ask  
10 how much time do you think that your expert's going to need to  
11 provide you with a report or whatever to -- so that you can be  
12 prepared to proceed.

13 MR. BERRY: Yes, Your Honor.

14 THE COURT: And do you know, can you estimate that?  
15 Or are you aware of that at this point?

16 MR. BERRY: Well, Your Honor, in speaking with Mr.  
17 Meineke, like I said, I think he can -- he lives in South  
18 Dakota. He comes down fairly frequently. So I think that this  
19 is something he can get done in -- in a day or two --

20 THE COURT: Uh-huh.

21 MR. BERRY: -- is my understanding. So if --

22 THE COURT: So if we have 30 days?

23 MR. BERRY: He can get it -- my understanding is he  
24 can get it done.

25 THE COURT: All right.

1 MR. BECKER: Your Honor, if I may?

2 THE COURT: Yes, you may.

3 MR. BECKER: It's my understanding from talking to  
4 Agent Tarpinian right before this hearing that the board is  
5 already up in Sioux Falls, which is where Mr. Meineke is.

6 THE COURT: At the FBI office or some place there?

7 MR. BECKER: U.S. Attorney's Office --

8 THE COURT: Okay.

9 MR. BECKER: -- is where he sets up and will do his --

10 THE COURT: So he can just -- in the same town, right?

11 MR. BECKER: Yeah. Now, I don't know what his  
12 schedule is, but it's there and it's ready to go. So  
13 transportation will not be an issue --

14 THE COURT: All right.

15 MR. BECKER: -- or problem, so if that helps Mr. Berry  
16 with regard to --

17 THE COURT: All right. Well, let's do -- let's do --  
18 put a thing here on -- on -- let's say on -- on 30 days. And  
19 get your CJA 21 to me as quickly as possible so that I can  
20 approve the excess or also send it off to Judge Riley for  
21 approval of excess in amount of the statutory amount. And I  
22 essentially then will, as to 108 -- get 108, 110 now -- well,  
23 110 is an amended one of 108, so is that correct?

24 MR. BERRY: That's correct, Your Honor.

25 THE COURT: Okay. So 108 can be termed and as result

1 of the amendment. And then 110 which is the independent  
2 review, that motion will be granted to the extent that you and  
3 your expert will have 30 days in which to prepare his report if  
4 you're going to use him at trial. If not, if you don't want to  
5 use him at trial then you have an obligation to provide a  
6 report to the government of his report.

7 MR. BERRY: Yes, Your Honor.

8 THE COURT: And obviously if you're not going to use  
9 him, then that's between you and -- you and the defendant then.  
10 Okay. All right. So 108 is termed as -- because of the  
11 amended 110. 110 is granted to the extent that you have 30  
12 days in which to utilize the services of -- of Mr. Meineke and  
13 that I will review your proposed -- and have him give you  
14 quickly a cap on what -- or what are -- what he -- what he  
15 expects that the amount to be so that I can approve it or get  
16 it in a position to send it quickly off to Judge Riley for his  
17 approval.

18 MR. BERRY: Yes, Your Honor.

19 THE COURT: All right. Now, that takes care of the  
20 discovery ones and the -- this. The other one we have in view  
21 is the -- is the motion in limine in this matter. And, Mr.  
22 Berry, I'll hear you on that. And I realize that this will --  
23 it may eventually come to a determination at trial by the trial  
24 judge in this case, but at this time I'm going to tackle it as  
25 a pretrial matter at this point. So I'll hear you.

1                   MR. BERRY: Your Honor, and it may -- from an  
2 evidentiary perspective may be logistically easier to do after  
3 the motions to suppress, but essentially --

4                   THE COURT: Well, if you want we can do that. If you  
5 think that's --

6                   MR. BERRY: I think that the --

7                   THE COURT: -- if both parties feel that.

8                   MR. BECKER: Either way. That's fine with the  
9 government, Your Honor.

10                  THE COURT: All right. Because then we'll have the --  
11 you'll have the exhibits in which is what you're seeking to  
12 keep out; is that correct?

13                  MR. BERRY: Yes, Your Honor.

14                  THE COURT: All right. Let's do that then. Let's  
15 then proceed then to the motions -- at this point we have two  
16 motions to suppress, 97 and 105. And so -- and we'll also  
17 consider at the same time the motion in limine, which is 95.  
18 So we're going to consider at this time in block 95, 97 and  
19 105. And with that in mind, do you wish to make an opening  
20 statement or present any evidence at this time, Mr. Berry?

21                  MR. BERRY: Your Honor, with respect to 97, 98 and 99,  
22 I would -- and I don't know how the Court wants it, I did file  
23 an index with the Court, like, for me to have these  
24 individual --

25                  THE COURT: I think we can -- I think we can just

1 refer to the filing numbers, and then we won't have to mark  
2 them as an exhibit unless they're going to differ from the  
3 filing numbers. So we have your -- we have your index at 99.

4 MR. BERRY: Okay.

5 THE COURT: And if the government wants to supplement,  
6 I think they've also filed an index too, and we can supplement  
7 that. But -- all right. I'll take note of -- I'll take  
8 judicial notice of filing number 99, which is the defendant's  
9 motion -- index in support of his motion to suppress.

10 MR. BERRY: Your Honor, the -- the -- the gist of --  
11 of this motion goes to the validity of the warrant. There is a  
12 document that is supposed to be a sealed document that is  
13 supposed to grant approval of the application. In the grouping  
14 of papers I received from the -- Mr. Davis and the government I  
15 did not receive that specific signed document indicating  
16 that -- well, which -- which is required. And I -- my brief  
17 explains the -- the case law and the background behind it.

18 Obviously as defense counsel I don't have access to that  
19 document. Mr. Becker did provide me with the document. He  
20 also provided -- later provided the copy of the document  
21 showing it was sealed. There is no date on the document. I  
22 have not seen the document. I think that I have a professional  
23 responsibility, and that's the responsibility to my client, to  
24 ensure that that document which is required for the wiretap  
25 warrant to be legitimate, that it was actually in the file;

1       that they -- Judge Smith Camp, the judge who reviewed it,  
2       actually had -- that it was actually in the file when she  
3       approved the warrant.

4           Logistically I'm not sure how we get there. My assumption  
5       is that the Court, that you, Your Honor, have access to that --  
6       to that file -- certainly Judge Smith Camp does -- to -- just  
7       to verify that the required document is in fact in the file  
8       with the affidavit for the wiretap.

9           THE COURT: All right. Let's deal with that first,  
10      Mr. Becker.

11           MR. BECKER: Thank you, Your Honor. And generally  
12      that's correct. The document that we're referring to is a  
13      memorandum commemorating the approval of a deputy assistant  
14      attorney general that allows for the U.S. Attorney's Office to  
15      apply for an electronic intercept.

16           We have confirmed that document is in fact in the court  
17      file. It's noted in the T3 documents as attached -- as Exhibit  
18      A to the application. We've provided the defense with a court  
19      stamped sealed copy of the document. Mr. Berry's correct,  
20      it -- that -- that document itself and the stamp on it doesn't  
21      have a -- a date.

22           THE COURT: Doesn't have a what?

23           MR. BECKER: It doesn't have a date. So it is stamped  
24      with the word "sealed" but not with a file stamp that includes  
25      the date. The document's in the court file for that

1 intercept warrant --

2 THE COURT: And -- and that's referring now to your  
3 index of -- of in response to the motion; is that correct?

4 MR. BECKER: Correct. We attached that document.

5 THE COURT: And the -- the number of that index?

6 MR. BECKER: I do -- Court's indulgence, Your Honor, I  
7 do not have the index number handy.

8 THE COURT: I think it's 119, but I'm not --

9 MR. NORRIS: We do too, but we're not -- we're not  
10 confident --

11 THE COURT: I am --

12 MR. BECKER: I apologize, Your Honor, I don't have the  
13 docket in front of me or the filing.

14 MR. NORRIS: If our response was 119, it may be 120.  
15 That's what we're --

16 MS. CHANG: 120 was --

17 THE COURT: Well, the -- the response was 117. There  
18 was a motion -- 118 is the motion to seal. And 119 is the  
19 sealed document index of evidence in support of the  
20 government's response in opposition to defendant's motion to  
21 suppress evidence regarding motion to file under seal  
22 government's index of evidence in support of the government's  
23 opposition to defendant's motion to suppress. And --

24 MR. BECKER: That's a lot of words. Your Honor, is  
25 the Court able to print off a -- a docket sheet or is court

1 staff able to?

2 THE COURT: Well, that's -- I was reading from the  
3 docket sheet. Here, let me -- let me get -- it is document  
4 number 119-1, and the -- it has a filing stamp of this court of  
5 November 19th, 2012, at 3:36 p.m., and it's page two of 54 in  
6 document number 119-1, as I pull up the index that's been  
7 filed.

8 MR. BECKER: Yes, that sounds --

9 THE COURT: Is that the document we're all --

10 MR. BECKER: That's the document we're all --

11 THE COURT: -- that we're all talking about? That's  
12 the important thing, that we all agree that this is the  
13 document we're talking about.

14 MR. BECKER: Yes, it's got the signature of Kenneth  
15 Blanco (phonetic) at the bottom.

16 THE COURT: And let me see, make sure -- well, it's --  
17 it's -- it doesn't have -- what it has is the -- is the order  
18 authorizing it, but the filing itself it is the -- well, I  
19 should say the letter is undated, because that's what Mr. Berry  
20 is complaining about is, I think. Is that correct, Mr. Berry?

21 MR. BERRY: Yes, it is. The letter itself and the  
22 file stamp are undated. So there's -- there's a -- there's a  
23 stamp that says "sealed."

24 THE COURT: That's correct.

25 MR. BERRY: The letter itself is undated.

1                   THE COURT: Uh-huh. Well, do we have --

2                   MR. BECKER: We can mark -- we can mark it as an  
3 exhibit, Your Honor.

4                   THE COURT: Let's mark it and -- well, but this is  
5 Exhibit 1 to this hearing.

6                   MR. BECKER: If I may approach, Your Honor?

7                   THE COURT: You may. Any objection by either side?

8                   MR. BERRY: No, Your Honor.

9                   THE COURT: All right. Exhibit 1 will be received for  
10 this hearing. And it shall be sealed.

11                  MR. BECKER: So, Your Honor, I understand certainly  
12 Mr. Berry's argument. I -- I don't know what the easiest  
13 resolution of the ultimate issue is.

14                  THE COURT: Well, first of all, his position is that  
15 it must be filed with the wiretap order?

16                  MR. BERRY: Correct.

17                  THE COURT: Or is -- or is it his -- and that simply  
18 having the letter authorizing it is insufficient unless it's  
19 filed with the order?

20                  MR. BERRY: That's the defense position. Filed along  
21 with the -- presented along with the application --

22                  THE COURT: All right.

23                  MR. BERRY: -- at the time application is made.

24                  THE COURT: All right. And do you have evidence that  
25 it was in fact presented along with the application?

1                   MR. BECKER: We do. The existence of the document  
2 itself, and then the document itself is within the Court's  
3 file. I don't know how to -- I guess we can -- I guess we can  
4 just offer testimony. We can -- we can offer testimony to  
5 that --

6                   THE COURT: Okay.

7                   MR. BECKER: -- to that regard, Your Honor.

8                   THE COURT: In other words, what you would -- apart  
9 from that, I'm -- since I'm not supposed to be up there  
10 authenticating evidence for you --

11                  MR. BECKER: Indeed, Your Honor.

12                  THE COURT: -- for you folks, either one of you. But  
13 you would get from the clerk of the court a certified copy of  
14 what's on file.

15                  MR. BECKER: Indeed, Your Honor. That -- that's what  
16 we -- that's what, I guess -- well, okay. We've presented an  
17 uncertified -- an uncertified copy. We can -- we can certainly  
18 obtain a certified copy of that. I can proffer -- I was  
19 present at the time of application, I can proffer that the  
20 letter was presented. I was the -- one of the -- one of the  
21 attorneys who presented the application.

22                  THE COURT: All right. Mr. Berry, are we --

23                  MR. BERRY: I -- I think I have a duty, Your Honor, to  
24 determine that the -- that the -- the document was filed and  
25 when it was filed, and that the judge who had the opportunity

1 to -- Judge Smith Camp had the opportunity to look at it. So I  
2 don't know if the -- if the solution is to get a certified copy  
3 from the file. Of course, I don't know what -- I don't know  
4 what that proves. My concern is even if we get a certified  
5 copy, it's not date stamped. It's not -- it's a non-dated  
6 letter. I assume though that if it's in that order that --  
7 that the judge did review it. I'm not sure how the electronic  
8 files work, but I would think that the Court would have access  
9 to that.

10 THE COURT: Was it -- well, I do have access to it and  
11 it's part of the -- well, it's part of the index. I don't  
12 have -- I don't have the wiretap record in front of me at this  
13 point, because ordinarily only the chief judge has that access  
14 unless authorized, or something else, because it deals with  
15 wiretaps.

16 MR. BECKER: Your Honor, can we ask the Court to take  
17 judicial notice of what's only the chief judge has access to?  
18 It's a little bit of a stretch in that it is a filing. It is a  
19 filing that is in the clerk's office. It is a filing that she  
20 supervised. And so therefore if we could ask the Court to take  
21 judicial notice of it, the Court could have access to see --

22 THE COURT: We can have access to it, but the  
23 important thing is Mr. Berry has to have access to it. And so  
24 what we really probably need is simply a certified copy of that  
25 filing that has attached to it the authorization from the

1 Assistant Attorney General. And we can -- we can do that. And  
2 we can have it accomplished very briefly I think here, just by  
3 making that direction to the clerk. And if it's there, it's  
4 there. And if it's not, it's not.

5 MR. BECKER: Your Honor, our problem with that is  
6 going to be -- I -- I agree with you 100 percent that it should  
7 be simple. But there are only a limited number of people  
8 downstairs who have access to that file.

9 THE COURT: I understand.

10 MR. BECKER: And I think they would -- if you asked  
11 for it --

12 THE COURT: Uh-huh.

13 MR. BECKER: -- and made that request, they would get  
14 it for you. If I go down and ask for it I'm --

15 THE COURT: Oh, I'm not asking you to go down at the  
16 moment, you know.

17 MR. BECKER: Well, no, I understand that. But we  
18 would have to find either Teresa or somebody else to -- to  
19 grant access.

20 THE COURT: What's -- what's Teresa's number?

21 THE COURTROOM DEPUTY: 7382.

22 THE COURT: Great. She's on the phone. What's  
23 Denise's number?

24 THE COURTROOM DEPUTY: 7360.

25 AUTOMATED VOICE: Your call has been forwarded to an

1 (indiscernible).

2 THE COURT: Did you say 7362? What is it?

3 THE COURTROOM DEPUTY: 7360.

4 THE COURT: 7660?

5 THE COURTROOM DEPUTY: 7360.

6 THE COURT: Jennifer also has it?

7 Hello, Theresa? Oh, Denise? Are you in the office or  
8 away?

9 DENISE: No, I'm out of the office.

10 THE COURT: Who's downstairs can get me a certified  
11 copy of a wiretap filing?

12 DENISE: (Indiscernible).

13 THE COURT: Well, I'm in the courtroom and we need it  
14 as an exhibit in a hearing and we need it as soon as they can  
15 get it. It's -- what's the filing number on your wiretap?

16 MR. BECKER: It's 12WT11.

17 THE COURT: 12WT11. And what it is is the application  
18 for the wiretap, and the -- the application has with it a  
19 letter from an Assistant Attorney General authorizing the  
20 attorneys to apply for the wiretap. I need a certified copy  
21 with a filing stamp on whatever it is that that is part of the  
22 application that was filed with the clerk and presented to  
23 Judge Smith Camp. Please. Thank you.

24 It will be brought to the courtroom. Pending that --  
25 that's the only issue in the motion; is that correct?

1 MR. BERRY: In that motion, yes, Your Honor.

2 THE COURT: All right. Let's wait and see what we get  
3 here. All right. Let's then proceed to the next motion.

4 MR. BERRY: Your Honor, I believe the next motion is  
5 to -- is going to be filings 105, 106 and 107.

6 THE COURT: That's the search of the defendant's  
7 house?

8 MR. BERRY: Correct, Your Honor.

9 THE COURT: All right.

10 MR. BERRY: And I'd ask the Court to take judicial  
11 notice of those filings.

12 THE COURT: All right. And then 105 had with it a  
13 brief which is 106, and an index which is 107. So 107 --

14 MS. CHANG: Your Honor, I would just ask that you take  
15 judicial notice of the fact that in government's filing 121 --

16 THE COURT: 121.

17 MS. CHANG: -- the --

18 THE COURTRoom DEPUTY: Please speak into the  
19 microphone.

20 MS. CHANG: -- the affidavit in support of the search  
21 warrant was again filed, and that one is the signed  
22 file-stamped copy. Your Honor, I believe the one that the  
23 defense filed is not signed.

24 THE COURT: All right. It's 122 is the sealed  
25 document.

1 MS. CHANG: Well, I believe 121 is the --

2 THE COURT: Motion.

3 MS. CHANG: -- index.

4 THE COURT: And 122 is the sealed index which  
5 contains -- which should contain the -- the document which --

6 MS. CHANG: That -- that's correct, Your Honor.

7 THE COURT: Make sure we got it here. Yes, it is  
8 Exhibit 1 to 122. So it's 122-1, pages 1 through 42. And  
9 you should have -- both have -- since you filed it, you should  
10 have access. Do you have that copy? You have that copy?

11 MR. BERRY: Yeah, I was -- I was actually sent it by  
12 Mr. Becker, yes, Your Honor.

13 THE COURT: All right. So the Court will take  
14 judicial notice of that for the purposes of this motion to  
15 suppress with regard to the search of the defendant's  
16 residence, filing -- filing number 122, Exhibit 1, pages 1  
17 through 42. Do you have any other evidence on the matter then?

18 MR. BERRY: No, Your Honor.

19 THE COURT: All right. Do you have any other evidence  
20 on the matter then?

21 MS. CHANG: No, Your Honor, just argument.

22 THE COURT: All right. Then I take it your proposal  
23 that 1 through 42 does not constitute probable cause to search?

24 MR. BERRY: That's correct, Your Honor.

25 THE COURT: I'll hear you.

1                   MR. BERRY: Your Honor, to sum up what I put in my --  
2                   in my brief, I think that they're going through this intricate  
3                   web of IP addresses and user names. There is no direct  
4                   connection to establish probable cause between the defendant,  
5                   Mr. DeFoggi, and his current address and the user names in  
6                   the -- in the warrant. Specifically the usernames PTasseater  
7                   and fuckchrist.

8                   You have groupings of convoluted web connections going back  
9                   to 2006/2007 where there are user names similar or the same  
10                  user names I used that are loosely attached to Mr. DeFoggi, but  
11                  we have not established that any of those user names are  
12                  unique.

13                  In one of the -- in the index I cited to a Myspace page  
14                  that was apparently at one point assigned to Mr. -- allegedly  
15                  assigned to Mr. DeFoggi, specifically I believe it was -- I  
16                  think it was the PTasseater name was someone different, some  
17                  Hispanic male.

18                  Like I said, because the user names were not established  
19                  as -- as unique, we don't know how many people out there using  
20                  the names PTasseater, fuckchrist, how prevalent they are on the  
21                  internet, or any of the other names that Mr. DeFoggi has  
22                  allegedly used. And therefore there is not probable cause to  
23                  establish that based on those IP addresses and the large web  
24                  of -- of user names, that there was probable cause to search  
25                  Mr. DeFoggi's residence at -- at that time.

1                   THE COURT: I'll hear the government.

2                   MS. CHANG: Your Honor, in general I think we need to  
3 focus on the meaning of probable cause. The affidavit  
4 articulated sufficient probable cause by setting forth a fair  
5 probability that evidence of a crime would be found at Mr.  
6 DeFoggi's residence.

7                   Indeed, even in U.S. v. Hire (phonetic), a case cited by  
8 the defense in support of his motion states that, quote,  
9 probable cause is a practical factual and non-technical concept  
10 dealing with probabilities. This is language directly lifted  
11 from the Supreme Court case Illinois v. Gates, in which the  
12 Court explicitly stated that in dealing with probable cause, as  
13 the very name implies, we deal with probabilities.

14                  The defendant cannot redefine what probable means to serve  
15 his purposes. What he proposes the issuing Court do is  
16 exercise a standard of proof that is entirely inappropriate to  
17 simply further the steps of the criminal process. Probable  
18 cause does not establish guilt. It does not establish a  
19 preponderance. And as the Supreme Court stated in Gates, the  
20 process does not deal with hard certainties, but with  
21 probabilities.

22                  The affidavit that Your Honor had a chance to review  
23 establishes such probability that child pornography activity on  
24 website A was linked to the defendant and his residence. I  
25 won't sum up now what the affidavit says itself, but there were

1 several pieces of evidence that linked Mr. DeFoggi's residence  
2 and his identity to that of PTasseater and fuckchrist on  
3 website A. Plainly corroborated by independent police activity  
4 and investigation.

5 Second, to the point that because there's no direct  
6 connection between website A and the defendant that there is no  
7 probable cause, a direct connection is not required for a  
8 finding of probable cause. Rather, an officer executing a  
9 search warrant may rely on the issuing judge's inference that  
10 such a nexus exists when that inference has quote, from U.S. v.  
11 Perry, common sense appeal.

12 And as outlined previously in our response the affidavit  
13 presented a totality of circumstances that would lead an  
14 issuing judge to conclude that there was a fair probability  
15 that evidence of the crime would be found at the targeted  
16 residence.

17 Moreover, the fact that the terms PTasseater and fuckchrist  
18 are not unique does not defeat the issuing judge's finding of  
19 probable cause. Such a standard is one that entirely departs  
20 from the meaning of probable cause itself.

21 And to move on to the Myspace page, the Myspace finding  
22 outlined in the affidavit as Your Honor saw is just one small  
23 and relatively inconsequential piece of an extensive probable  
24 cause showing. The defendant presents no further evidence  
25 other than one visit to a current Myspace page to lead this

1 Court to conclude that that claim is either correct or  
2 dispositive.

3 In any event, Your Honor, even assuming arguendo that  
4 probable cause was lacking, the Leon good faith exception would  
5 allow the admissibility of the evidence obtained from the  
6 residential search.

7 THE COURT: Do you wish to respond?

8 MR. BERRY: No, Your Honor.

9 THE COURT: All right. That motion will be taken  
10 under advisement and the motion will be deemed submitted.

11 The other motion that we deal with now is a motion in  
12 limine, I believe is the only remaining motion; is that  
13 correct?

14 MR. BECKER: I think so, Your Honor.

15 THE COURT: And the -- and do we have -- you have  
16 specific --

17 MR. BECKER: Page 10 of my brief, Your Honor, if  
18 that's what you're looking for.

19 THE COURT: Pardon?

20 MR. BECKER: Page 10 of my brief, specific statements.

21 THE COURT: Well, I'm looking for Mr. Berry to -- the  
22 private messages sent to and from the two web things. Is there  
23 an exhibit that we have that will provide that? And then we  
24 can refer to that. Mr. Berry, do you have an exhibit of that?  
25 It could be to the extent that it might be even from, you know,

1 one of the exhibits from a detention hearing too, that I  
2 believe the --

3 MR. BECKER: Your Honor, there is a -- an exhibit --  
4 could I confer with counsel really quick?

5 THE COURT: You may confer, uh-huh.

6 (Discussion off the record.)

7 MR. BECKER: So, yeah, Judge, we do have and we're  
8 prepared to submit just for purposes of the hearing an exhibit  
9 that has all of the private messages sent and received.

10 THE COURT: Good. And we agree upon that then?

11 MR. BERRY: Yes, Your Honor.

12 THE COURT: All right. Let's have that marked as  
13 Exhibit 2.

14 MR. BECKER: And if I may approach?

15 THE COURT: You may.

16 MR. BECKER: And we have provided a -- a copy of this  
17 to the defense today.

18 THE COURT: Very well.

19 MR. BECKER: Just so we all have the same thing in  
20 front of us. Government Exhibit 2, Your Honor, is a  
21 compilation of the private messages sent and received by the  
22 user fuckchrist, screen name PTasseater, on the PedoBook  
23 website, which is website A referred to in some of the legal  
24 process.

25 THE COURT: And Exhibit 2, Mr. Berry, has various

1 highlighting. I take it is the highlighting that you seek to  
2 move in limine to not be discussed?

3 MR. BECKER: I should clarify, Your Honor, that's the  
4 government's highlighting.

5 THE COURT: Oh, okay.

6 MR. BECKER: That's not -- we've provided this today  
7 to -- to Mr. Berry. We had previously provided this to the  
8 defense --

9 THE COURT: Was his --

10 MR. BECKER: -- provided this copy to the --

11 THE COURT: Was his highlighted?

12 MR. BECKER: Sorry?

13 THE COURT: Was his highlighted?

14 MR. BECKER: The copy we provided to him today was  
15 highlighted.

16 THE COURT: All right.

17 MR. BECKER: But that -- that's our highlighting, not  
18 theirs.

19 THE COURT: I'll give you a moment then, Mr. Berry, to  
20 review their highlighting to see if we're all on the same page.  
21 And we can turn the recording off pending that.

22 (Pause.)

23 THE COURT: Any objection to A?

24 MR. BERRY: No, Your Honor.

25 THE COURT: All right. A will be received. And the

1 Court does note that on -- in A is the letter attached to the  
2 application. All right. That'll be received.

3 Now, let's go back to Government's Exhibit 2. Mr. Berry,  
4 in the highlighting that -- that is there, did you have --  
5 other than the highlighting -- what you sought in your motion  
6 in limine?

7 MR. BERRY: I -- I do not believe so, Your Honor.

8 THE COURT: All right.

9 MR. BERRY: It looks like it covers -- it covers most  
10 of it.

11 THE COURT: All right. So the Government's Exhibit 2  
12 will be received. And Government Exhibit 2 has various  
13 portions that are highlighted which is the subject of -- that  
14 highlighting is the subject of the defendant's motion in  
15 limine. And so therefore is there any further evidence from  
16 either side on the motion in limine at this point?

17 MR. BECKER: There will be from the government, Your  
18 Honor, just I think for clarification sake, it will be at  
19 trial, the government's intent to introduce all of the private  
20 messages sent and received by the defendant through the user  
21 account PTasseater and fuckchrist. I want to make sure that we  
22 are explicitly, from the government's side, not limiting  
23 ourselves in any way to only admitting the ones that are  
24 highlighted. We highlighted those today for a particular  
25 purpose to assist with our argument.

1                   THE COURT: Okay.

2                   MR. BECKER: I'm --

3                   THE COURT: I guess -- I guess what I'm -- what I'm  
4 looking at is that there was a motion in limine because of the  
5 defendant's allegation of inflammatory aspect of it. And the  
6 inflammatory aspect particularly would be that is the  
7 highlighted matter, which he seeks in his motion in limine.  
8 That is not any aspect of precluding the government from  
9 introducing any type of evidence in its case. It's just what  
10 we're dealing with in the motion in limine is the highlighted  
11 portions in Exhibit 2. And if there's other matters, it's  
12 called objection to evidence or whatever else or additional  
13 motions in limine or whatever, this is what we're talking about  
14 in your motion in limine. Is that right?

15                  MR. BERRY: Yes, Your Honor.

16                  THE COURT: Okay. Now, all right.

17                  MR. BECKER: There are a few more exhibits that'll be  
18 pertinent at least to the government's argument, Your Honor.

19                  THE COURT: All right. You have -- you have no  
20 further evidence on your motion in limine.

21                  MR. BERRY: No, Your Honor.

22                  THE COURT: Then you may present such evidence as you  
23 wish on your motion in limine -- on the motion in limine.

24                  Mr. Becker, you're on.

25                  MR. BECKER: Okay. Your Honor, I think we're now at

1 government -- we're now at Exhibit 3.

2 MR. NORRIS: I think 3 just went in.

3 MR. BECKER: 3 just went in. We're on 4 now.

4 All right. If I may approach? Government Exhibit 4, which  
5 we provided a copy of to the defense.

6 THE COURT: All right. Again, I note highlighting.

7 Was that -- was it similarly highlighted for the defendant?

8 MR. BECKER: This is Government Exhibit 4 has been  
9 highlighted by the government for purposes of -- of our  
10 argument.

11 THE COURT: All right.

12 MR. BECKER: Not -- not highlighted by the defendant.

13 THE COURT: But I mean, you provided a copy -- the  
14 copy that you provided --

15 MR. BECKER: Yes.

16 THE COURT: -- to the defendant has the highlighted  
17 portions?

18 MR. BECKER: Yes, it does, Your Honor.

19 THE COURT: Okay. Thank you.

20 MR. BECKER: Sorry. Government Exhibit 4 consists of  
21 both the user information as well as the content of comment  
22 posted by the user PTasseater on the website iMGSRC.ru. This  
23 website and the comments -- some of the content of the comments  
24 referred within them are discussed in part in the residential  
25 search warrant affidavit. And I'll have more to say about that

1       during our -- during our argument in terms of the significance  
2       there. In essence, these are comments of a similar nature to  
3       those made by PTasseater/fuckchrist on PedoBook website --

4                 THE COURT: All right.

5                 MR. BECKER: -- that help to identify --

6                 THE COURT: Any -- any objection on that, Government  
7       Exhibit 4?

8                 MR. BERRY: No, Your Honor.

9                 THE COURT: All right. Received.

10                MR. BECKER: Government Exhibit --

11                THE COURT: Did I note -- did I note 2 received, Mary  
12       Beth?

13                THE COURTROOM DEPUTY: Yes.

14                THE COURT: All right. 2 is received too. Do we have  
15       a 3?

16                THE COURTROOM DEPUTY: No.

17                MR. BECKER: We skip 3?

18                MR. NORRIS: I misspoke, I thought 3 was the original  
19       website A.

20                THE COURT: Now, I have --

21                MR. NORRIS: All right. We don't have a 3.

22                THE COURT: -- 2. This is 3? Or should be 3?

23                MR. BECKER: It can -- it can stay as 4. It can stay  
24       as 4, Your Honor.

25                THE COURT: It can stay 4, all right. It'll stay 4.

1                   MR. BECKER: We now have an Exhibit 3 which, if I may  
2 approach?

3                   THE COURT: And this was provided to opposing counsel;  
4 is that correct?

5                   MR. BECKER: It has been, Your Honor.

6                   THE COURT: And is it in the same format where it is  
7 we have the dual colors and so forth?

8                   MR. BECKER: It has been provided that -- in that  
9 format to the defense, Your Honor.

10                  THE COURT: All right.

11                  MR. BECKER: Both separately in discovery and today.

12                  THE COURT: All right.

13                  MR. BECKER: And Your Honor, Exhibit Number 3, which  
14 is titled Messages in Pagefile.sys, S-Y-S, consists of text  
15 that was found in a -- in a computer, a laptop computer, in the  
16 defendant's household that was seized pursuant to a search  
17 warrant on April 9th, 2012. The particular -- these particular  
18 messages are found in a file called a pagefile that's discussed  
19 in our response to the -- to the motion in limine.

20                  These were -- these are messages and the content of the  
21 messages that were extracted from that laptop computer seized  
22 from the defendant's home, again involving the topic of the  
23 violent sexual abuse of children, and again similar nature to  
24 those private messages sent on PedoBook by  
25 PTasseater/fuckchrist, similar also in content to those

1 commented on by PTasseater in the website iMGSRC.ru.

2 THE COURT: Any objection to the exhibit for the  
3 purpose of this hearing?

4 MR. BERRY: No, Your Honor.

5 THE COURT: All right. Exhibit 3 will be received for  
6 the purpose of this hearing.

7 MR. BECKER: And then just one further exhibit, Your  
8 Honor. That'll be Exhibit Number 5. Actually haven't provided  
9 a copy of this to the defense. It's merely a chart to assist  
10 with argument. I can put it on the ELMO when we're actually  
11 using it, but I wanted to mark it for now.

12 MR. BERRY: That's fine.

13 THE COURT: Exhibit 5, is that what it is?

14 MR. BECKER: If I may approach?

15 THE COURT: All right. Mary Beth, go make a couple  
16 copies of that right away.

17 THE COURTROOM DEPUTY: Two?

18 THE COURT: Yeah. Or make three while you're at it,  
19 while you're --

20 MR. BECKER: Your Honor, may I approach for another  
21 sticker?

22 THE COURT: You may.

23 (Discussion off the record.)

24 THE COURT: Mr. Norris, make sure --

25 MR. NORRIS: Yes, Your Honor.

1                   THE COURT: -- Mr. Berry gets a copy.

2                   MR. BERRY: Thank you.

3                   THE COURT: Now, I take it you're going to use this  
4 just as a demonstrative for your argument; is that correct?

5                   MR. BECKER: That's correct, Your Honor.

6                   THE COURT: All right.

7                   MR. BECKER: We do have one more exhibit that is  
8 Government Exhibit 6. If I may approach? I unfortunately just  
9 have that copy, Your Honor, I apologize.

10                  Your Honor, Government Exhibit 6 is a -- a printout or  
11 screen shot from the page of the PedoBook website that  
12 discusses the rules of the website. I have shown it to the  
13 defense.

14                  THE COURT: And you have a -- did you say you have a  
15 copy or another copy?

16                  MR. BECKER: I -- I do not, Your Honor, that's the  
17 only copy that -- that I have.

18                  THE COURT: Well, I don't have a color copier in my  
19 chambers.

20                  MR. BECKER: I don't -- I don't think a color copy  
21 would be necessary for the -- the purpose of it, Your Honor,  
22 it's really to discuss the text anyway. I'm happy to use the  
23 ELMO.

24                  THE COURT: All right. Well, show it -- show it to  
25 him and -- and we'll provide a color copy to him at the

1 conclusion of the hear -- or you will provide a color copy at  
2 the conclusion of the hearing. But show it to Mr. Berry now so  
3 that he can follow along.

4 MR. BERRY: And, Your Honor, I've been -- I've been  
5 provided a copy of that, and I believe I have the -- the color  
6 copy specifically of the -- the PedoBook and the rules. I've  
7 also -- Mr. Tarpinian has also shown it to me --

8 THE COURT: All right.

9 MR. BERRY: -- while examining the forensic evidence.

10 THE COURT: Okay. Thank you. Then we're all on the  
11 same thing.

12 MR. BECKER: If we can use the ELMO --

13 THE COURT: All right.

14 MR. BECKER: -- while we're actually discussing it,  
15 Your Honor.

16 THE COURT: All right. Now, do you have any further  
17 evidence?

18 MR. BECKER: Not from the government, Your Honor.

19 THE COURT: All right. Any in rebuttal?

20 MR. BERRY: No, Your Honor.

21 THE COURT: All right. Then let's have at it.

22 MR. BERRY: Your Honor, after reviewing the  
23 government's brief, specifically page 10, it appears that they  
24 want to use this to prove that the defendant was PTasseater or  
25 fuckchrist, and essentially they want to show that this is the

1 same person making chats in different places but also what has  
2 been found specifically on his computer at his home when his  
3 home was searched.

4 This is a child pornography case and child exploitation  
5 case and there are some references to child exploitation. I  
6 understand that some of those are -- are fair game based on my  
7 review of the case law. My concern is that there are also  
8 statements about the murder and decapitation of children.

9 Obviously, Mr. DeFoggi has not been charged with conspiracy  
10 to commit murder. And so I think that there are some -- there  
11 are violent acts in here outside of the description of the  
12 pictures. And looking through, I believe it's Exhibit Number  
13 2, which is -- if you look on the upper left-hand corner it's  
14 titled PedoBook, Mr. DeFoggi allegedly makes comments that are  
15 not violent in nature, that comments on -- on -- on -- on some  
16 of the photos.

17 My argument is that the -- the graphic and violent and  
18 murderous statements are unfairly prejudicial. This is fantasy  
19 chat as noted in the Pedo -- PedoBook site. And so while I  
20 understand that it may show an interest in -- in children, part  
21 of this is fantasy. And if people have fantasies to commit  
22 murders and -- and commit other crimes, well, that may -- is  
23 not necessarily relevant to fantasies regarding sex with  
24 children, sexual exploitation of children.

25 So I -- I believe that these -- some of these comments,

1 the highlighted comments and I think there's a couple others I  
2 noticed in there that talk about decapitation, I would argue  
3 they're -- they're unfairly prejudicial. There may be some  
4 relevance in establishing a connection, but I would argue that  
5 there is -- there's -- are enough messages comments about  
6 photographs posted and videos and other information that was on  
7 the site, that speaks specifically to the crimes alleged, and  
8 we do not need to get into fantasy chat about murder,  
9 decapitation, mutilation.

10 THE COURT: Counsel?

11 MR. BECKER: Thank you, Your Honor. And, Your Honor,  
12 both myself and Mr. Norris will be, I think, arguing on behalf  
13 of the government. I'm going to try to, I think, condense  
14 the -- the factual aspect of things and -- and point out some  
15 of the -- the links between this and very crucial evidence  
16 against the -- the defendant.

17 Of course the defendant's charged with engaging in a child  
18 exploitation enterprise as well as conspiracies to advertise  
19 and to distribute. It is incumbent upon the government to  
20 prove that he in fact participated in those conspiracies to  
21 advertise and distribute child pornography and that he did so  
22 through the PedoBook website of which we must prove he was in  
23 fact a member acting though his user name  
24 PTasseater/fuckchrist.

25 One factual point to point out, that's -- that's one

1 account. That is one user. And so when a user logs into the  
2 site they're -- the user name here is fuckchrist, the user puts  
3 in a password, and then when a user takes actions on the site  
4 the name that appears to other users is PTasseater. And so we  
5 are talking about one account on the -- the PedoBook -- the  
6 PedoBook site that encompasses those two user names.

7 If Your Honor looks at the -- the graphic that we -- that  
8 we've prepared I've tried to just lay out in I think a visual  
9 sort of fashion how this identification takes place. It's an  
10 identification that is highly complicated by the fact that the  
11 users of PedoBook chose to utilize the Tor network and chose to  
12 utilize the anonymizing benefits of that network.

13 And so that means that the sort of direct evidence that one  
14 might normally rely on in proving the identity of the user of a  
15 website isn't available to law enforcement. And so what we've  
16 got to look to are the circumstantial links that link Timothy  
17 DeFoggi to his user name PTasseater and fuckchrist on that  
18 site.

19 And an important part, a component of that, ends up being  
20 messages that discuss the violent sexual abuse of children.  
21 And that is these messages are -- are important and very  
22 significant in proving that this man is in fact PTasseater and  
23 fuckchrist on PedoBook.

24 And so that -- there's a couple of important -- important  
25 pieces of the -- the picture here. When a search warrant was

1       executed on April 9th of 2012 in the defendant's home, as we  
2       discussed in our response, he was found at a laptop computer.  
3       He actually had to be physically removed from it. Being  
4       downloaded on that computer was a video of child pornography  
5       from a Tor network child pornography website.

6           The computer itself, a forensic examination was conducted  
7       on the computer, were numerous -- excuse me, two different  
8       types of evidence elimination software. That added another  
9       level of complication to the examination because that software  
10      is designed to hide the tracks of what a computer user is doing  
11      on that computer.

12          Thankfully, in the pagefile document that Your Honor has as  
13       Government Exhibit 3 was extracted some substantive activity,  
14       some -- some actual chat comments, chat messages, or pieces of  
15       chat messages from that computer. The topic of those messages  
16       as Your Honor can see from Government Exhibit 3 is the violent  
17       sexual abuse of children. So that becomes a substantive factor  
18       here in terms of linking the defendant to the use -- the use of  
19       this site.

20          Also contained within Government Exhibit 3, Your Honor will  
21       see references to the user name fuckchrist directly within  
22       the -- the content of those messages that were extracted from  
23       the laptop computer in -- in the defendant's residence, the  
24       very same one he had to be removed from the morning of -- of  
25       the search.

1       When Your Honor looks at the PedoBook private messages sent  
2 and received -- and I apologize, I -- I forgot which exhibit  
3 number that is, it's page numbered 10 through 50. Your Honor  
4 will certainly see numerous messages discussing violent sexual  
5 abuse, the rape of children, the murder of children. The  
6 context of those -- of those comments is important.

7       And that is that they're -- these private messages, and  
8 numerous of them, are not discussing these sorts of matters in  
9 isolation, they're discussing these sorts of matters, one,  
10 within the context of the PedoBook website itself dedicated to  
11 the exploitation of children, but they're also occurring in the  
12 context of talking about and seeking and talking about viewing  
13 videos and images depicting just that sort of abuse.

14       The fact is the evidence in this case is going to be that  
15 user PTasseater and fuckchrist had a particular interest in  
16 child pornography. It wasn't child pornography just in general  
17 or in any type, it was child pornography that was violent. It  
18 was child pornography that was particularly focused on very,  
19 very young infant, baby, toddler-aged children who were  
20 experiencing sexual abuse.

21       And so if Your Honor takes a look at some of the -- the  
22 highlighted messages, Your Honor will see message after message  
23 discussing not just sexual abuse and -- and violence, but  
24 discussing videos, wanting to get videos, where the user's  
25 discussing how he's not able to find videos that are violent

1 enough depicting this sort of abuse.

2       And this is part and parcel to the conduct that's a part of  
3 the conspiracy here. It really goes to the heart of the  
4 government to prove not just of identity, but certainly of  
5 identity, but also proof of participation in the conspiracy  
6 itself.

7       So members of PedoBook participated in that website in  
8 various ways. They registered. They set up a user account.  
9 It's a social networking website. They would friend other  
10 users, or have other users friend them. They would join as  
11 PTasseater did, public and private groups. Many of those  
12 groups, many of the groups that PTasseater joined, the  
13 defendant joined, were dedicated specifically to images of very  
14 young children, to violent images, groups -- you know, groups  
15 that contained terms like "no limits," that contained terms  
16 like "hurt core" referring to that violent sexual abuse.

17       And so this is not -- these are not chats that are existing  
18 in a fantasy. These are chats with a purpose. And the purpose  
19 is furthering this conspiracy. And the purpose is getting the  
20 defendant to have access to the type and the particular kinds  
21 of child pornography images that he was seeking out.

22       So I'll just -- if I can just highlight a few of those  
23 messages here. If we go -- actually go to the last page of the  
24 PedoBook exhibit, it's page number 50, the very last message on  
25 the bottom is discussing, did you get the NFL video? We'll

1 have testimony that NLF refers to no limits fun. No limits fun  
2 referring to particularly violent images or video of -- of  
3 child pornography.

4 And it's then -- it's discussing, can't wait for someone to  
5 post it, love to see her getting brutally raped. Since I'm in  
6 the U.S. hard to come by little ones that you can live out your  
7 fantasies with.

8 So again you see that this, you know, this fantasy is  
9 really an interest. And that's what we're talking about. And  
10 the interest is tied not just to murder and sexual abuse, but  
11 the commemoration of it through image and video, the core  
12 purpose of the conspiracy here.

13 So if we look at there are countless examples here of  
14 private messages sent by the user fuckchrist to other users  
15 seeking pictures. We see a number of those examples on page 47  
16 where the user in multiple private messages is asking another  
17 user to send pictures of particularly violent child  
18 pornography.

19 We see those sorts of examples again on page -- just to  
20 commemorate it for the record -- on page 45. On page 44 we see  
21 again the defendant discussing the NLF, no limits fun, video  
22 with another user in the context of the -- this interest in  
23 again violent sexual abuse of children.

24 We see other examples on page 43, the defendant talking  
25 about screen captures for a video called Daisy's Destruction.

1 Again, discussing those videos of child pornography within the  
2 context of his particular interest.

3 So I won't belabor the point in terms of the -- the factual  
4 examples, Your Honor. I think we've highlighted a number of  
5 them that make it clear. Again this is -- this is something  
6 that is part and parcel of the -- the proof of the defendant's  
7 participation within the -- within the conspiracies that are  
8 charged, but also that identify him.

9 In government's -- in the iMGSRC.ru exhibit, Your Honor,  
10 and again we've highlighted some examples there. Now, this is  
11 a direct connection. And if we go to the -- the chart that  
12 we've got here. The PTasseater user name shows up on the  
13 iMGSRC.ru website and there is a direct connection between the  
14 defendant's residence and that website, because there are  
15 literally hundreds of IP addresses from his Verizon internet  
16 account in his name that tie into the user PTasseater on the  
17 website iMGSRC.ru. That was a regular internet website, not a  
18 Tor network website. And so the IP addresses from that site  
19 are useful in identifying who the user is. And so there's a  
20 direct connection between the defendant and that iMGSRC site.

21 And then what do we see in the comments of that iMGSRC  
22 user? Again, we see comment after comment talking about again  
23 the violent sexual abuse of children. And we've -- we've  
24 highlighted those, those examples throughout the exhibit.  
25 Those examples are all tied to an IP address the Court will

1 look at.

2 So if the Court looks at page 28, again towards the end of  
3 this -- of this document we'll see comments by that user, love  
4 stroking it to little girls in pain, nothing hotter than a  
5 little one gasping for air and crying while you slam your cock  
6 down their throat.

7 Both of those comments tied in -- not only to the user  
8 PTasseater, but that IP address 96.231.186.155, the IP address  
9 at the defendant's home at that -- at that time.

10 And so just again to the -- the factual point about the --  
11 the significance of these messages being I think identification  
12 obviously, but also how he participated.

13 If Your Honor looks at the rules exhibit -- and I think  
14 I'll just -- I'll put this up on ELMO so we can all see it --  
15 this is Government Exhibit 6, Your Honor, just up on the ELMO.  
16 You see the PedoBook rules. Well, there are particular rules  
17 for -- we see, you know, here are the rules for our community.  
18 PedoBook is a communication tool for fellow pedos to discuss  
19 their interests and share content. Here are the rules for our  
20 community, one, be civil, PedoBook is for the discussion of our  
21 mutual pedophilic interests in a mature and civilized fashion,  
22 please be respectful of your fellow users even those that do  
23 not share your point of view.

24 Number two, extreme content/topics, one, for example hurt  
25 core, scat, etcetera, hurt core being particularly violent

1 sexual abuse, scat involving bodily fluids. Bestiality is  
2 allowed only if it involves children or JB -- JB commonly  
3 referring to jail bait. No snuff or gore. Please keep these  
4 topics private to you and your friends or in groups that are  
5 private to their members out of respect for those that find it  
6 distasteful.

7 And so what do we see in terms of the use that the user  
8 PTasseater and fuckchrist makes of the site? We see these  
9 private messages exchanged with that user's friends discussing  
10 those sorts of more extreme topics that were of particular  
11 interest to him.

12 So, you know, we see a user who's actually following the  
13 rules of the site by engaging in those communications. That's  
14 powerful evidence of his knowing and intentional participation  
15 within the conspiracy that's taking place on that site.

16 So I can -- I'll turn it over to my colleague, Mr. Norris,  
17 who will discuss the -- the law behind our -- our defense.

18 MR. NORRIS: Your Honor, I'll be somewhat brief  
19 because --

20 THE COURT: Make sure you get to the mic there.

21 MR. NORRIS: Will this work? I'll be somewhat brief  
22 because all of this is set forth in the brief that was  
23 submitted with regard to the motion in limine.

24 If this was a robbery case or a homicide case or something  
25 along those lines, we wouldn't be contesting that some of these

1 images would be problematic and should be problematic. But  
2 that's not what this case is. This is a child exploitation  
3 case. It's a child pornography case. It has everything to do  
4 with what his intent was, what his plans were, what his motive  
5 was, and identifying him.

6 It is -- you can't just say, well, that's a fantasy, and  
7 you get to discharge that. Which is basically what he's  
8 telling you, these are fantasy-type statements. Well, it's up  
9 to a jury to decide whether they're fantasy or whether the  
10 evidence is intent, or whether they evidence plan, or whether  
11 they evidence identity, and it's not for us to just toss out  
12 there because he claims that they're fantasy. So that's a  
13 little bit of a misnomer and I wanted to address that first of  
14 all.

15 Mr. Berry talked about how this has to do with a  
16 decapitation and murder. Well, it has -- as Mr. Becker has  
17 shown you -- it has much more to do than a decapitation and  
18 murder. It shows sexual abuse as part of that decapitation of  
19 a child. Sexual abuse being the resounding factor.

20 If you look in those chats you will see chats in which he's  
21 trying to reach out to a co-conspirator. Another  
22 co-conspirator who happens to live in the area. And by that  
23 area I mean Washington, DC. Trying to get together after  
24 talking about their mutual desire to see this and to live this  
25 out. Trying to reach out to that individual. And if they

1 can't do what they intend to do or if they want to do or what  
2 Mr. DeFoggi wants them to do, then maybe they can masturbate to  
3 images of it, or -- or a video of it, or something along those  
4 lines.

5 So again, it is much, much more than something that's  
6 unrelated. It is integrally related to what we have here. So  
7 if you look at this under a 104 basis or a relevancy, it is  
8 clearly relevant. There can really be no argument that it's  
9 anything but relevant.

10 So then we look to whether or not it's 404(b) or  
11 inextricably intertwined as well. And as Mr. Becker has  
12 indicated to you all of this evidence is part and parcel of the  
13 government's proof. Part and parcel of the government's proof  
14 as it relates to elements that we have to prove with regard to  
15 this matter.

16 So inextricably intertwined evidence is outside Rule  
17 404(b). The question is whether the evidence is properly  
18 admitted to provide the jury with a complete story of the crime  
19 on trial, whether its absence would create a chronological or a  
20 conceptual void, whether it is so blended or connected that it  
21 incidentally involves explains the circumstances surrounding or  
22 tends to prove any element of the charged crime. And all of  
23 this tends to prove an element of -- of the charged crimes and  
24 it is inextricably intertwined.

25 So it's not necessarily a 404(b) analysis that we get into

1 because it is inextricably intertwined, it is direct evidence,  
2 it is part and parcel of what we're trying to prove. But let's  
3 talk about whether it's 404(b) or not or whether we can rely on  
4 404(b).

5 We've given notice. All of this has been provided with  
6 regard to discovery. And there is plenty of case law that  
7 suggest that the Rule 404(b) is a rule of inclusion and not  
8 exclusion.

9 I've cited a couple of cases in this. I -- I believe  
10 Reynolds is one. Both out of -- and another one is Allen out  
11 of the Eighth Circuit. Both relating to 404(b) evidence as it  
12 relates to child pornography or child exploitation cases. So  
13 the rules aren't all that much different than they've been in  
14 any other type of case. We have to demonstrate to the various  
15 predicates, all of which we can do here.

16 What I want to bring the Court's attention to are the cases  
17 that talk about prejudice, because that seems to be the big  
18 argument here. Prejudice. Never mind that he's the one who's  
19 created his own prejudice. Never mind that his prejudice are  
20 his intent, his thoughts, what he's trying to accomplish by  
21 being a member of this particular board. And now he wants to  
22 use that prejudice to preclude the government from proving its  
23 particular case.

24 If you look at I think the first case that I indicated was  
25 United States v. Worthey, where the Court considered a 403

1 challenge to child pornography admitted before the jury. First  
2 the Court rejected his argument that the District Court erred  
3 by permitting the government to play videotapes containing  
4 child pornography. Worthey's important because it dismissed  
5 any attempt by the defendant to stipulate to this, allowing the  
6 government to prove this, so it threw out Old Chief as a  
7 defense in this type of case. There's a previous case called  
8 McCourt that did exact same thing.

9 In Worthey the Court said, we do not agree with Worthey  
10 that the video clips unfairly prejudiced him. Our court  
11 considered and rejected a similar argument in McCourt. The  
12 only argument that McCourt offers in support of his unfair  
13 prejudice claim is that videos of child pornography, more so  
14 than still images, arouse emotions that a jury is unable to set  
15 aside in reaching its verdict. While the videos were no doubt  
16 unfavorable to McCourt, the fact remains that 403 does not  
17 offer protection against evidence that is prejudicial in the  
18 sense of being detrimental to a party's case. The rule  
19 protects against evidence that is unfairly prejudicial. And  
20 this -- and Worthey was not considered to be unfairly  
21 prejudicial.

22 I ask the Court to take a look at United States v. Manning,  
23 a very recent decision in the Eighth Circuit in which the Court  
24 allowed -- the District Court allowed the use of chat logs to  
25 demonstrate that Mr. Manning was in possession of child

1 pornography. The Court indicated that chats are admissible for  
2 an additional reason. They are circumstantial evidence, i.e. a  
3 non-hearsay purpose, associating Manning with the child  
4 pornography found on his computer.

5 In United States v. Koch our Court affirmed a District  
6 Court's decision to admit evidence of documents found on a  
7 computer and flash drive that contained information identifying  
8 the defendant. This Court held that it was within trial  
9 court's discretion to do so. The chat transcripts found on the  
10 computer can alternatively be construed as circumstantial  
11 evidence connecting Manning to the child pornography on the  
12 computer and on the Memorex disc discovered near the computer.  
13 In other words, no matter how the chat conversations are  
14 characterized, the District Court was within its discretion to  
15 admit it. If we look at a peer 404(b) analysis, we're relying  
16 on identity, intent, motive, plan, participation in the  
17 conspiracy, as well as the act.

18 There are all sorts of other Eighth Circuit cases that I  
19 don't -- I don't really think it's necessary for me to go into  
20 right now, but Broomfield, Cook, also talk about chats and  
21 those chats being admissible with regard to 404(b) to show one  
22 of those elements.

23 And then there were two cases that I would ask the Court to  
24 also take a look at because they appear to be on point. One is  
25 a DC Circuit case, United States v. Hite (phonetic), that

1 appears to be on point, the same type of chats offered for the  
2 same type of purpose by the government. And then in the  
3 Seventh Circuit United States v. Chambers, the defendant's  
4 images and chats were, as the Court -- as the Seventh Circuit  
5 said, sure to disgust the jury toward the defendant. However,  
6 the Seventh Circuit observed, sexual abuse of a child or the  
7 attempt thereof is a disgusting crime and any evidence of it is  
8 no doubt unfavorable to the defendant, but here it was not  
9 unfairly prejudicial.

10 Again here, Mr. DeFoggi's chats were disgusting. So were  
11 the crimes he's charged with. He created his own prejudice by  
12 posting his own thoughts and comments on that board and those  
13 comments and thoughts are fair game for the government in order  
14 to prove who he is, the fact that he posted what his intent was  
15 and all of the things that we've set forth in the -- in the  
16 brief.

17 Thank you.

18 THE COURT: Mr. Berry.

19 MR. BERRY: Your Honor, looking specifically at  
20 Manning, the Eighth Circuit did say that, look, these chats are  
21 admissible. But the chats in Manning were not like the chats  
22 in this case where they talk about murder, decapitation and  
23 mutilation.

24 So again the issue isn't prejudice, it's unfair prejudice.  
25 And that's where I think the line should be drawn is in the

1       murder, the mutilation, the decapitation. If we look at  
2       Exhibit Number 4, the part the government highlighted  
3       specifically says, love fantasy chat and comments, to the  
4       lawless governments who try to criminalize consensual sex you  
5       need to reject Christianity. And it goes on.

6           But essentially it indicates I love these fantasy chats and  
7       comments. The fantasy, these go beyond sexual fantasies, these  
8       go into murderous fantasies. And I believe that's outside the  
9       scope. Because I -- I agree everything's prejudicial. The  
10      government wouldn't be offering if it wasn't. But this point  
11      it becomes unfairly prejudicial because we've gone into a crime  
12      outside of just the exploitation of children, but the -- the  
13      killing, maiming and decapitation of children.

14           THE COURT: I will make a report and recommendation to  
15      Judge Bataillon with regard to the motion in limine. Keeping  
16      in mind you have various aspects of when if there -- if it was  
17      to be granted in any respect, whether it's during voir dire or  
18      opening statements to so forth. Obviously the problem is is  
19      that if the testimony is going -- or the evidence is going to  
20      be allowed that while it would be very shocking in voir dire  
21      and opening statements unless the parties are unable -- or able  
22      to explore whether or not a jury could sit during such a case  
23      and while such evidence is being adduced.

24           That's critical to both sides with regards to whether or  
25      not they could get a fair and impartial jury in the case. But

1 I'll keep that all in mind when I make my report and  
2 recommendation to Judge Bataillon on that matter.

3 The only other matter today is the defendant's motion for  
4 modification of the detention order in the matter. Is there  
5 any other matters that's loose at this point?

6 MR. BECKER: No, Your Honor.

7 MR. BERRY: Not that I'm aware of, Your Honor.

8 THE COURT: All right. Mr. DeFoggi, you do have the  
9 sympathy of the Court. And I will not allow a furlough to  
10 attend the funeral of your mother, but I would allow an escort  
11 by -- suitable to the United States Marshals to and from -- to  
12 and from a viewing or whatever.

13 However, such a -- such a trip is at defendant's expense.  
14 The government is not going to pay for that. And it may be  
15 prohibitive because whether or not both the -- both the  
16 transportation for yourself and for probably a minimum of two  
17 marshals and so forth would be very prohibitive in the matter.

18 So I'm going to deny your motion for modification of the  
19 detention order to the extent that you're seeking a furlough --  
20 in other words that you get out and go to the funeral and come  
21 back -- that is not going to happen according to my order. But  
22 what I would permit is if you arrange and show a financial  
23 responsibility to the marshals, and whatever the marshals will  
24 need for the purposes of such an escort, then I would permit  
25 that. But again it's going to be probably prohibitive in

1 expense in the matter.

2 But that being the case, that will be my order on that  
3 thing. And I'll get an order on that immediately so that if  
4 you wish to appeal that order to Judge Bataillon you may do so.

5 The other orders will be submitted after the transcript is  
6 filed in this matter, and then I'll have a report and  
7 recommendation on file.

8 The one matter which you must attend to, Mr. Berry is the  
9 30 day on our expert.

10 MR. BERRY: Yes, Your Honor.

11 THE COURT: And so that if there are any other motions  
12 as a result of your report of your expert, I will -- they'll be  
13 done within the 30 day too, in that period. Okay?

14 MR. BERRY: Yes, Your Honor.

15 THE COURT: All right. Presumably then after the  
16 report and recommendation and if there's any objections to it,  
17 the time Judge Bataillon needs to rule upon the motions within  
18 the Speedy Trial Act, then the case will be set for trial.

19 MR. NORRIS: Your Honor, I think the designated is  
20 complex.

21 THE COURT: Pardon?

22 MR. NORRIS: The (indiscernible) we agree that this is  
23 complex.

24 THE COURT: Right. It is a complex case, but we  
25 still -- we still need to promptly get the matter to trial.

1 MR. BECKER: We do have a trial date of April 28th,  
2 Your Honor.

3                   THE COURT: Okay. Exhibit 6 wasn't offered. I take  
4 it you wish that to be offered?

5 MR. BECKER: Yes, Your Honor. I'm sorry.

6                   THE COURT: All right. I'll receive it. Okay.  
7 Anything further today?

8 MR. BECKER: No, Your Honor.

9 MR. BERRY: No, Your Honor.

10 THE COURT: All right. We're in recess. Counsel's  
11 excused.

12 (3:11 p.m., recessed.)

13 I, Vicki L. Jarchow, Transcriber, certify that the  
14 foregoing is a correct transcript from the official electronic  
15 sound recording of the proceedings in the above-entitled  
16 matter.

18 | Vicki L. Jarchow

March 31, 2014  
Date